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TESTIMONY BEFORE THE SENATE COMMERCE

SUBCOMMITTEE ON COMMUNICATIONS

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My name is Jeremiah S. Buckley. I am a partner in the Washington office of the law firm of Goodwin Procter, and I serve as general counsel to the Electronic Financial Services Council.

The EFSC is an association of technology companies and financial service providers dedicated to promoting the availability and delivery of financial services through electronic commerce.

Given this mission, the EFSC is intensely interested in federal legislative developments that could have an effect on e-commerce. For this reason, we are pleased to have the opportunity to comment this afternoon on S. 630, the CAN SPAM Act of 2001.

The EFSC recognizes that federal legislation is not merely helpful, but sometimes necessary to resolve legal uncertainties and unleash the economic potential inherent in our new e-commerce environment. Thinking back to the passage last year of the Electronic Signatures in Global and National Commerce Act ("ESIGN"), we know that this Committee shares our belief in the benefits of appropriate legislation. We have enjoyed working with Senators Burns and Wyden in

the past, and we look forward to working with the Committee and its staff once again in dealing with the very significant issue of unsolicited commercial electronic mail (“UCE”).

We agree with the fundamental premise underlying S. 630 – that consumers should be protected from misleading, offensive, fraudulent or otherwise harmful UCEs, and that the ability of consumers to control the flow of their e-mail traffic should be respected. Achieving these goals is an important step in assuring that consumers feel comfortable using the electronic medium as a preferred way of doing business, a goal we all share.

UCE Legislation Should Fit Into the Framework Created by Previous E-Commerce Legislation.

Congress has repeatedly endorsed a vision of e-commerce as a national resource. Last year’s passage of ESIGN legislation established the parity of electronic and non-electronic communications under federal law. ESIGN recognized that the Internet is a borderless medium, for which federal regulation and uniform federal standards are appropriate. Our specific comments reflect our strong support for this vision of e-commerce as a national resource appropriately subject to a set of uniform national rules designed to encourage the development of e-commerce to its fullest potential.

S. 630 recognizes that legal uniformity is important to e-commerce, and for that reason it includes a provision – Section 7(b) – preempting inconsistent state laws. The preemption provision, however, has a number of exceptions: in particular, it does not apply to any state trespass, contract or tort law. This type of exception, we would caution the Committee, runs the risk of swallowing the preemption provision itself. If S. 630 is to fashion a uniform national standard for dealing with spam, it should occupy the field. S. 630 should not leave room for the

development of a patchwork of state legislative or judicial pronouncements using tort or trespass theories to create a compliance jigsaw puzzle which only the most sophisticated players can solve.

Having established a uniform federal standard, we believe that the appropriate course is to assign to federal agencies the responsibility for enforcing that standard. To the extent that enforcement policy shapes or clarifies the meaning of the provisions of S. 630, it seems to us best to leave that power with agencies which are subject to the jurisdiction and direction of Congress. State attorneys general and private parties should not be assigned enforcement responsibilities in this area as a matter of federal law.

While the authority of a state to enact legislation inconsistent with S. 630 would be preempted, states would, of course, continue to have the power to enact unfair and deceptive acts and practices (“UDAP”) statutes, or interpret their current UDAP statutes, so as to define violations of S. 630 as unfair and deceptive practices under state law. In this context, the states would be free to assign enforcement responsibilities for their UDAP statutes to their state attorneys general or such other agencies or private parties as they deem appropriate. It seems to us that this course of action has the advantage of providing a clear line of demarcation between state and federal law and is more respectful of the right of state legislatures to determine how state law will be enforced within a state’s boundaries.

Need for Clear Definitions.

Section 5(a)(5)(A) of S. 630 requires that a UCE contain a “clear and conspicuous ... identification that the message is an advertisement or solicitation.” Because of the centrality of this requirement to the purposes of S. 630, we believe that the Committee should consider a more

precise definition of what constitutes clear and conspicuous identification. It might be worthwhile for the Committee to consider creating a standard identifier to appear in the e-mail subject line, to serve as a universal signal that the e-mail is an advertisement. This requirement could then be included in the legislation itself, or provided as an example in the Committee's report. In the absence of such clear guidance, senders of UCEs will be left uncertain as to the efficacy of their compliance efforts.

Likewise, we would counsel against the use of undefined terms, such as "primarily" to determine the amount of advertising content that defines a "commercial electronic mail message." If, in a communication relating to a transaction with its customers, a firm includes an electronic "statement stuffer" alerting the customer to other products or features available to the customer, S. 630 does not establish how much such material will render the communication "primarily" advertising. We would recommend that, to avoid this problem, any communication related to a transaction or relationship with an existing customer be excluded from the definition of a "commercial electronic mail message."

Preserving the Reliability of E-Mail Communications.

Last year's E-SIGN Act was a vote of confidence by the Congress in the predictability and reliability of electronic communications. E-SIGN envisions that individuals and businesses will be able to contract freely through electronic media, without having to worry about the enforceability of contracts that they enter into electronically. It also envisions that business will continue to be conducted electronically after the initial contracts have been signed, with records being freely transmitted in fully electronic relationships if the parties so desire. In the non-electronic world a third party cannot arbitrarily disrupt a contractual arrangement between two

parties, and E-SIGN envisions that this should not be able to happen in e-commerce either.

However, we are concerned about reports that ISPs, in their eagerness to help their subscribers avoid receiving unwanted UCEs, may block e-mails that the subscribers not only want, but have specifically contracted to receive as part of an electronic business relationship. This result would have a significant negative impact on the potential growth of electronic delivery of financial services. S. 630 does nothing to prevent this from happening, and does not even require ISPs to give notice to consumers they intend to block, or that they have blocked, the transmission of e-mail either in general or from particular senders.

It is in the interest of all who seek to promote e-commerce to preserve the sanctity of electronic contracts. If an electronic message which is not a UCE is not going to be delivered, at a minimum both the sender and the recipient should be notified by the ISP. We hope to work with ISPs and with your committee, as appropriate, to develop standards that assure reliable delivery of permission-based electronic communications.

We appreciate the opportunity to share our views on S. 630 and the willingness of the sponsors of this legislation and their staffs to work with us and others to assure that the CAN SPAM legislation will create clear and workable standards to regulate the transmission of UCEs.